Supreme Court, U.S.
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No. 93-189

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

COMMONWEALTH OF PENNSYLVANIA,
Respondent

v.

DONALD NICHOLAS FETZNER,
Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is accurate, but not complete. Petitioner had not only a prior acquittal in 1981 for selling obscene materials, but also a prior conviction in Crawford County for almost identical materials, thus putting him on notice to the fact that different juries in different places and at different times may view what is obscene differently. In addition, as noted in the Opinion (see Appendix) of the trial court (large portions of which were adopted by reference by the Superior Court), Petitioner had entered into a stipulation acknowledging that he knew both the nature and the content of the two magazines in question. The magazines in question were recent publications, not even in existence at the times of Petitioner's earlier contacts with the legal system.

SUMMARY OF THE ARGUMENT

Petitioner attacks the constitutionality of the scienter element of 18 Pa.C.S.A. Section 5903 as applied to his case. The statute does not purport to create strict liability, but rather requires a defendant know both the nature and the content of the allegedly obscene material. In this case, Petitioner and his counsel freely entered into a stipulation that Petitioner possessed that statutorily required knowledge. As a result of that stipulation, the Commonwealth presented a Motion in Limine to the trial court, resulting in a ruling that Fetzner could not testify about his prior experiences from the previous decade. This ruling was clearly proper, in that the proffered evidence bore no relevance to the statutory requirements regarding scienter. What Petitioner was attempting to do was assert a

defense not recognized in the law--a "good faith" defense, whereby he claimed his personal opinion was that the magazines were not obscene, therefore, he should not be criminally responsible for selling the magazines.

ARGUMENT

Petitioner's claim that there is some constitutional deficiency in 18 Pa.C.S.A. Section 5903 as it relates to scienter is without merit. As set forth in the Petition for Writ of Certiorari, the statute requires the Commonwealth to prove beyond a reasonable doubt that, inter alia, the accused ". . .[know] the obscene character of the materials . . ." in question; and further defines "knowing" as "having general knowledge of . . . the character and content of (the) material . . ." Obviously, this does not create strict liability, for it does

require knowledge on the part of the accused. The statute does not, however, allow for a "good faith defense" or a claim that "I didn't think a jury would find this to be obscene," which is the thrust of Petitioner's argument. The trial court fully examined all the materials involved in Petitioner's prior case over ten years previous to the present case and concluded that the materials were entirely different from the present materials. See Appendix, Opinion of the trial court, p. A-5. As the court rightly noted, it is not the act depicted that is prohibited by law, it is when certain acts are depicted in an obscene matter. Thus, by the very nature of obscenity law, analysis must proceed on an item-by-item basis, with an individual decision made for each item. Further, contemporary community standards must be

applied, and they may change with time. Ultimately, the fact that one individual "bondage" magazine may have been found in 1981 to be not obscene bears no relevance in examining whether a totally different magazine would be found in 1991 to be obscene. There is no constitutional requirement that a person must specifically intend to be a criminal, that is, specifically intend to violate the criminal law. That is the standard this Petitioner proposes. He wishes the law to be "as long as I think it's okay to sell this," (and perhaps include a requirement that this be a good faith decision), then the law should be powerless to prevent the sale or punish the seller.

The trial court examined this claim at length and correctly concluded that the Pennsylvania statute traced constitutionally

approved language, including as to the scienter element. See Appendix, Opinion of the trial court, p. A-8, citing Hamling v. U.S., 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 590 (1974). The prior experiences of the Petitioner bore no consequence with regard to his knowledge of the character and content of these two magazines. Id. There is no requirement that the accused know the magazine will be found to be obscene. See id, citing American Booksellers Assn., Inc., v. Rendell, 332 Pa.Super. 537, 481 A.2d 919 (1984). All that the Constitution requires is that the accused be aware of the kind and nature of the depictions included in the material, a requirement which was met by the stipulation. His personal opinions as to what depictions are or are not obscene are not at issue.

Similarly, Petitioner's desire to offer evidence as to other search warrants being served in 1986, or as to attempts to secure advisory opinions from various public authorities or private entities bore no relevance to any issue before the jury. The jury had to determine if these magazines were obscene and if Petitioner knew the nature, character and content of these magazines, not whether Fetzner believed they would find the magazines to be obscene. See Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). Under Petitioner's analysis, from 1981 until the end of time as long as he says he thought something was no worse than the prior materials, he could sell it with impunity. He could make his own self-serving determination of what he could sell.

Fortunately, the law provides for no such defense; the accused is not his own judge and jury. The analysis also ignores the "contemporary" part of "contemporary community standards." It is clear that contemporary means the standards of the present, not five or ten years ago. Commonwealth v. Dell Publishing, Inc., 427 Pa. 189, 233 A.2d 840, cert. denied 390 U.S. 948 (1967). The trial court properly excluded the proffered evidence as being irrelevant to any issue at trial, as Petitioner had already stipulated to the scienter required, that he knew the nature, character and content of the materials. See Mishkin v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419, reh. denied, 414 U.S. 934, 86 S.Ct. 1440, 16 L.Ed.2d 535 (1966).

CONCLUSION

It is respectfully requested that this Honorable Court deny the request for review. The Pennsylvania courts have properly analyzed the statute in question, the mens rea requirement is constitutional and has been accurately interpreted by the state courts. Petitioner was denied nothing other than his attempts to introduce irrelevant evidence, to rewrite the statute and to become his own judge and jury.

Respectfully submitted,

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By James K. Vogel
James K. Vogel
First Asst. District Atty.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
v.	:	OF ERIE COUNTY, PENNSYLVANIA
DONALD NICHOLAS FETZNER	:	No. 1690 of 1990

Appearances: James Vogel, Esquire, and Jane Earll, Esquire, for the Commonwealth
Carl Max Janavitz, Esquire, for the defendant

O P I N I O N

Bozza, John A., J.

The defendant, Donald Nicholas Fetzner, was charged with a violation of the obscenity statute based upon the sale of two magazines containing explicit sexual materials from Filmore News, an adult bookstore owned by Fetzner. The magazines at issue, "Into Bondage" and "Bondage Classics", were purchased from that establishment on August 10, 1989 and March 25, 1990, respectively, by a state police officer.

The defendant proceeded to a trial by jury before this Court on March 8, 1991, which resulted in a guilty verdict. The defendant filed a Motion for New Trial and

In Arrest of Judgment which was denied by this Court. On May 9, 1991, the defendant was sentenced to a term of incarceration of six to twenty-three months and three years probation, and fined $10,000.00. This matter now comes before the Court upon the defendant's Concise Statement of Matters Complained Of On Appeal.

Initially, Mr. Fetzner argues that the Court committed error by failing to grant his motion to quash the informations based upon application of the doctrine of "collateral estoppel". In addition, he asserts that the instant prosecution is contrary to "fundamental fairness", a concept which he suggests is embodied in both the Constitutions of the United States and Pennsylvania. The question of "fundamental fairness" centers on defendant's position that he lacked notice of the obscene nature of the materials for which he is being prosecuted. Mr. Fetzner reasons that because

he was acquitted of obscenity charges in 1981 in Erie County for what he characterizes as substantially the same material, it is fundamentally unfair to allow prosecution for the two magazines in question. The concept of "fundamental fairness", however, does not encompass defendant's circumstances, but rather relates to the conceptual process historically used by the United States Supreme Court to determine which aspects of the Bill of Rights apply to the states by incorporation through the Fourteenth Amendment. See: Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L.Ed. 288 (1937); Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672, 91 L.Ed. 1903 (1947). Apart from that inquiry, the notion of "fundamental fairness" has no precise or practical meaning in criminal jurisprudence with the possible exception of the "shock the conscience" reasoning expressed by the court in Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96

L.Ed. 183 (1952). Similarly, Pennsylvania's Constitution includes no explicit rule or derivative concept of "fundamental fairness" procedural due process. See, Article I, Section 9.[1]

Mr. Fetzner asserts that his prosecution on obscenity charges for selling two books, "Into Bondage" and "Bondage Classics", was barred by his previous acquittal in 1981 of obscenity charges for the sale of different materials which contained depictions of the same sexual conduct portrayed in a similar manner. It is apparent that under a traditional double jeopardy analysis, defendant's position is unsupportable. See:

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[1]The defendant asserts that inherent in the scienter element of the Pennsylvania obscenity law is the requirement of notice, suggesting that in order to knowingly commit a criminal offense, an individual must have notice that the material he is selling or distributing is obscene. This issue will be addressed in the context of subsequent discussion.

United States v. Linetsky, 553 F.2d 192 (1976). Notwithstanding defendant's "collateral estoppel" approach, the conclusion is the same. While the doctrine of "collateral estoppel" is most often applied in civil cases, it does have limited applicability in criminal cases within the context of a double jeopardy type of analysis. See: Commonwealth v. Curry, 325 Pa. Super. 365, 472 A.2d 1162 (1984). In Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed. 469 (1970), the United States Supreme Court defined collateral estoppel as follows:

> ". . . it simply means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."

397 U.S. at 442, 90 S. Ct. at 1194

The Court went on to recognize collateral estoppel as a rule of law ". . . embodied in the Fifth Amendment guarantee against double

jeopardy." Id at 397 U.S. 446, 90 S. Ct. 1195. In Ashe, the defendant was tried twice for his alleged participation in a robbery of six poker players. In the first trial he was acquitted of robbing one particular victim. Six weeks later the prosecution tried him again for the same robbery but alleging a different victim. The Court determined that the issue of the defendant's participation in the robbery was resolved in the first trial and that the doctrine of collateral estoppel barred another trial where a jury would once again be asked to resolve that same issue.

In 1981 a jury acquitted Mr. Fetzner of obscenity charges with regard to numerous items including a magazine entitled "Swat". "Swat" included depictions of activities similar to those contained in the two magazines which are the subject of this prosecution. However, while the subject matter was similar, the photographs and the

textual material were not the same or nearly identical to that contained in the magazines "Into Bondage" and "Bondage Classics". Indeed, the magazines were entirely different.

The issue to be tried by the finder of fact in the present prosecution was squarely different from the issue resolved in 1981: i.e., Are the magazines "Into Bondage" and "Bondage Classics", when taken as a whole, obscene? That question had not been adjudicated with regard to this defendant on any prior occasion. See, United States v. Kamins, 479 F.Supp. 1374 (1979). The law of obscenity does not forbid the depiction or description of particular acts. Rather, it forbids depictions or descriptions of sexual conduct which are obscene. While a portrayal or description of sexual behavior may be found not to be obscene, a jury may find that a different portrayal or description of the same behavior has crossed the obscenity line.

All of the characteristics of a particular expression have some impact on whether it appeals to the prurient interest and otherwise meets the requirements of the obscenity standard. The form of the media may alter radically the appeal and the utility of a depiction or description of sexual conduct as may the context within which it is presented. In that regard, expressive material has individualistic characteristics that distinguish one item from another. Moreover, it is the application of contemporary community standards and not some fixed view of acceptability which is determinative. Even assuming, as defendant has suggested, the magazines in question "depict and describe the activity of the bondage of women in virtually the same manner, degree of domination and level of sexual explicitness", the result cannot be different.

The defendant avers that the Court erred in denying defendant's request for Proposed Voir Dire Questions. Asserting that the Court limited its inquiry to "a few emasculated, self-vouching" voir dire question. Mr. Fetzner suggests the Court was required to probe prospective jurors ". . . deeply held views about sex, sexual morality and sexually explicit materials especially in reference to homosexuality and sado-masochism . . .". In that regard he requested that the Court ask each juror eighty-seven (87) questions.

The scope of voir dire rests within the sound discretion of the court. Commonwealth v. Deligatti, 371 Pa. Super. 315, 538 A.2d 34 (1988). The purpose of the voir dire examination is to provide an opportunity to counsel to assess the qualifications of prospective jurors to serve. Commonwealth v. Johnson, 452 Pa. 130, 305 A.2d 5 (1973). It is therefore necessary to conduct an

examination of jurors in a manner calculated to disclose fixed opinions or to expose other reasons for disqualification. Commonwealth v. Johnson, supra.; Commonwealth v. Swanson, 432 Pa. 293, 248 A.2d 12 (1968), cert. denied. 394 U.S. 949, 89 S.Ct. 1287 (1969). Thus, the inquiry must be directed at ascertaining whether the prospective juror is competent and capable of rendering a fair and impartial verdict. Commonwealth v. Johnson, supra.; Commonwealth v. Swanson, supra.

The voir dire examination in Mr. Fetzner's case was sufficient to disclose whether a prospective juror had formed a fixed opinion concerning an issue in the case or manifested any other indication of bias or prejudice. Indeed, voir dire was conducted comprehensively in three phases: the completion of a questionnaire, directing of questions to the entire panel and individual voir dire. While it may have been helpful

from the perspective of an advocate to "probe deeply" into a prospective juror's views and feelings about personal matters, it is not a sine qua non of the objectives of voir dire. Commonwealth v. Slocum, 384 Pa. Super. 428, 559 A.2d 50 (1989).

The defendant next asserts that he should have been allowed to tell the jury that he was acquitted of obscenity charges in 1981 and show the jury the materials from the former trial. Once again he argues that the magazine "Swat" is substantially similar to the material for which he is presently being prosecuted and maintains that he relied on this acquittal to form the belief that the two magazines in question were not obscene. Therefore, he suggests that he did not "know" the magazines were obscene. Pennsylvania's obscenity statute requires proof of a specific intent consistent with constitutional requirements. As the statute

indicates:

> (a) Offenses defined - No person, knowing the obscene character of the materials involved, shall:
>
> . . .
>
> (2) sell, lend, distribute, exhibit, give away or show any obscene materials to any person 17 years of age or older.

Section (b) then defines "knowing as:

> "Knowing." As used in subsection (a), knowing means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any material described therein which is reasonably suspectable of examination by the defendant. (Emphasis added)

18 Pa.C.S. Section 5903. See, Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 590 (1974).

Mr. Fetzner's acquittal of obscenity charges in 1981 did not involve the magazines "Into Bondage" and "Bondage Classics" and was of no consequence with regard to his

knowledge of the character and content of each. The mens rea requirement for an obscenity prosecution does not require a showing that an accused knew that an expression was legally obscene. American Booksellers Assn., Inc. v. Rendell, 332 Pa. Super. 537, 481 A.2d 919 (1984). It is sufficient if the Commonwealth proves that a person was aware of the kind of depictions or descriptions which were included in allegedly obscene material. In this case the prosecution's burden was met by Mr. Fetzner's stipulation that he knew the nature and content of the two magazines. Evidence of Mr. Fetzner's previous acquittals (or perhaps convictions[2]) for distributing obscene material involving depictions of similar sexual conduct was not related to a material

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[2]There was evidence offered by the Commonwealth during argument that Mr. Fetzner had previously been convicted of similar charges in Crawford County.

issue in this case.

Similarly, the defendant also argues that the Court erred in refusing to allow him to introduce into evidence or testify regarding certain magazines and videotapes seized by the Pennsylvania State Police from his business in 1986 pursuant to a search warrant which were subsequently returned to him without prosecution. Its Mr. Fetzner's position that the return of these materials, which he suggests were far more explicit and graphic and depicted the full range of sado-masochistic conduct, indicated to him that they were not obscene and accordingly he believed that the magazines in question were also legally acceptable. Initially it is noted that there is no clear indication as to why the seized materials, which included videos and magazines, were returned, nor why a prosecution was not initiated and no conclusion in that regard can be properly drawn by the Court. More significantly, the

seizure of the state police did not involve the same magazines which are the subject matter of the present prosecution, nor did it affect Mr. Fetzner's knowledge of the character and content of these magazines. Accordingly, the defendant's offer of proof was properly rejected.

Similarly, Mr. Fetzner's attempt to introduce evidence of his efforts to obtain opinions of the Erie County District Attorney and the Coalition Against Violent Pornography as to whether the magazines in question were obscene was properly rejected by this Court. Neither the conduct of the defendant nor either entity to which inquiries were directed is relevant to any issue in his case.

Mr. Fetzner has alleged a number of allegations of error concerning the Court's refusal to accept his position that the obscenity standard must be viewed from the perspective of the sub-group that finds

allegedly obscene material appealing. In essence, Mr. Fetzner has suggested that the sado-masochists who would have been most likely to have purchased "Into Bondage" and "Bondage Classics" would not have found either magazine to be patently offensive or to have prurient appeal. Therefore, the defendant argues that this Court should have allowed him to present evidence that the magazines were designed, distributed to and purchased by a specific sexually deviate group identified as sado-masochists. Moreover, he maintains that it was error for the Court to overrule his demurrer on the ground that the Commonwealth had failed to meet a burden of proof to establish the contemporary community standards of sado-masochists and by refusing his proposed jury instruction regarding the issue of the magazines appeal to prurient interest. For the reasons stated below, this Court found the defendant's position without legal merit.

In Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973), the United States Supreme Court delineated an obscenity test which included the requirement that expressive material alleged to be obscene must appeal to the "prurient interest in sex", as had been previously held by the Court in Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L.Ed.2d 1498 (1957). In Roth, the Court took note of a number of definitions of "prurient" or "pruriency" and it is apparent that the use of the term reflected the Court's interest in distinguishing between different kinds of expressive material which depicted or described sexual conduct. The Court stated as follows:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest.[20] The portrayal of sex, e.g., in art, literature and scientific works,[21] is not itself

> sufficient reason to deny material the constitutional protection of freedom of speech and press . . . "

354 U.S. at 486, 77 S. Ct. at 1310.

If material appeals to "prurient interest" then indeed it may be obscene. "Pruriency" is defined in Roth as the . . . "quality of being prurient; lascivious desire or thought . . . ." 354 U.S. at 487, 77 S. Ct. at 1310, f. n. 20.

The defendant's assertions suggest a need for a subjective determination of the prurient appeal of expressive material which would require an assessment of whether a particular target population found allegedly obscene items to have the quality of pruriency. Neither Miller nor Roth dictates such an approach. Rather, an opposite standard is required. It is not an item's appeal to am particular population or segment of the community which determines its pruriency, but rather the expressive qualities of the item itself. Whether an

item has the quality of appealing to an interest in sex that's prurient is to be determined by jurors from the perspective of an "average person" applying contemporary community standards. Miller v. California, supra., 413 U.S. at 25, 93 S. Ct. at 2615; Roth v. United States, supra. 354 U.S. at 490, 77 S. Ct. at 1312.

The defendant's reliance on Mishkin v. New York, 383 U.S. 501, 86 S. Ct. 958, 16 L.Ed.2d 535 (1966) is misplaced. In Mishkin, the court found it was not necessary for the prosecution to show that allegedly obscene material appealed to the prurient interest of the public at large or to the "average" person. Id. 509. It is sufficient, the court noted, if the average person would find the material appeals to an interest in sexual conduct which is prurient. The question is not to whom does the material appeal, but rather "to what?". Therefore, it is sufficient if the average person believes

that the material appealed to the prurient interest of a group with a particular sexual orientation, notwithstanding the lack of such appeal to others. In Mishkin, no claim was made that the materials, which included sado-masochistic depictions, did not appeal to the prurient interest of the group for whom they were intended and the Court did not hold that one can avoid liability for the dissemination of obscene materials if they were directed to an exclusive audience who did not regard the material as having a prurient quality. " . . . [O]bscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant." Smith v. United States, 431 U.S. 304, 97 S. Ct. 1766 (1977).

As the foregoing analysis indicates, Mr. Fetzner's request to introduce evidence of the intended appeal of "Into Bondage" and "Bondage Classics" to sado-masochists was properly rejected. Whether those who engage

in the type of conduct displayed in the magazines believe them to have prurient appeal is not a relevant consideration. Within the context of an objective determination of how the average person would perceive materials, the point of view of a particular individual or group is of no significance.[3]

Similarly, this Court properly overruled defendant's demurrer with regard to the assertion that the Commonwealth was required to prove the contemporary community standards of sado-masochists and properly rejected Fetzner's proposed jury instruction with

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[3]The defendant asserts that the Court committed error after ruling on his offer of proof by refusing to allow him to testify as to his name, address and his lifelong residence in Erie County. Mr. Fetzner wanted to take the stand and answer the enumerated questions and an additional question related to his proffer, ostensibly to indicate to the jury his willingness to testify to certain matters no allowed by the Court. The defendant's willingness to testify was not related to any issue material to his guilt or innocence.

regard to the issue's appeal to prurient interest.

During his trial, Mr. Fetzner argued to the Court that the conduct depicted in the two magazines was not sexual conduct within the meaning of Pennsylvania's statute. He requested that the Court admit into evidence - by judicial notice - an amendment to the obscenity statute adding "sado-masochistic abuse" to the definition of sexual conduct. See, 18 Pa.C.S.A. Section 5903(b). Refusing Mr. Fetzner's request, this Court determined that the question of whether the magazines depicted or described sexual conduct was for the jury to determine and the legislature's actions in amending the statute was not relevant to that task. The introduction of a change in statutory language, even assuming a clear manifestation of intent, would essentially constitute the admission of evidence which implied the legislature's opinion of the adequacy of the

definition of sexual conduct in the original statute. This was a matter entirely within the province and ability of the jury to resolve and Mr. Fetzner's request was correctly rejected.

Finally, defendant contends that the Court erred in denying all of the defendant's requested points for charge (with the exception of the Court's allowance of defendant's request for the definition of "prurient interest"). When evaluating jury instructions, the charge must be read as a whole. The trial court has broad discretion in phrasing its instructions, and may choose its own wording as long as the law is clearly, adequately and accurately presented to the jury for its consideration. Commonwealth v. Ohle, 503 Pa. 506, 470 A.2d 61 (1983). This Court's jury instructions accurately reflected the applicable law of the Commonwealth and were sufficient to present the jury with the statements of law

necessary to render a verdict.

For all of the reasons stated above, this Court's decision denying the defendant's request for post-trial relief is affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS
v.	:	OF ERIE COUNTY, PENNSYLVANIA
DONALD NICHOLAS FETZNER	:	No. 1690 of 1990

O R D E R

AND NOW, to-wit, this 5 day of August, 1991, in accord with this Opinion, it is hereby ORDERED, ADJUDGED and DECREED that this Court's judgment of sentence of May 9, 1991, is hereby AFFIRMED.

By the Court,

_____
John A. Bozza, Judge

cc: James Vogel, Esquire,
Assistant District Attorney
Carl Max Janavitz, Esquire